U.S. Department of Labor

Office of Administrative Law Judges
603 Pilot House Drive, Suite 300
Newport News, Virginia 23606-1904

TEL (757) 873-3099
FAX (757) 873-3634

Date: February 15, 2001

Case No.: **2000-LHC-00756**

OWCP No.: **5-96730**

In the Matter of:

RONNIE L. DAVENPORT,
Claimant,

v.

NORFOLK SHIPBUILDING AND DRYDOCK CORPORATION,
Employer,

and

RICHARD-FLAGSHIP SERVICES,
Carrier.

Representation: Robert J. Macbeth, Jr., Esq.
For the Claimant

Donna White Kearney, Esq.
For the Employer

Before: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART BENEFITS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act ("the Act"), as amended, 33 U.S.C. § 901 et seq.

On July 20, 2000, a formal hearing occurred in Newport News, Virginia. The parties presented evidence and their arguments at the hearing held by the undersigned, and as provided by the Act and the applicable regulations. The findings and conclusions that follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

Stipulation of Facts[1]

Employer, Norfolk Shipbuilding and Drydock Corporation, and Claimant, Ronnie Davenport, stipulated to the following facts:

1. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act.

2. On August 24, 1995, Claimant sustained an injury to his right ankle.

3. Claimant and Employer were in an employee/employer relationship at the time of Claimant's injury.

4. Claimant timely reported his injury of August 24, 1995 to Employer.

5. Employer timely filed an Employer's First Report of Injury.

6. The applicable average weekly wage is $477.75, yielding a compensation rate of $318.50.

7. Claimant was terminated from his employment with Employer on September 26, 1995.

8. Employer paid $27,118.00 temporary total disability from September 20, 1994 until May 7, 1997.

9. Employer paid $15,670.20 in permanent partial disability benefits for a 24% permanent impairment of Claimant's right foot from May 8, 1997 through April 16, 1998.

---

[1]The following abbreviations will be used as citations to the record:
Ex.- Employer's exhibits.
Cx.- Claimant's exhibits.
Tr.- Transcript of hearing held on July 20, 2000 before Administrative Law Judge Richard K. Malamphy.

10. The date for which Claimant last received compensation benefits was April 8, 1998.

11. Claimant worked as a building superintendent with the United States government from October 3, 1997 through February 17, 1998 earning $10.00 per hour for 40 hours of work per week.

12. After leaving the employ of the United States government, Claimant worked for the Virginian Pilot where he earned $5.15 per hour for four hours per night. He worked this job for two nights, quitting because of the hours.

13. In May 1998, Claimant worked for Dagenhart Sprinklers earning $6.25 per hour. He worked this job for two days, leaving to begin employment with Kramer Tires.

14. Claimant began working at Kramer Tires on May 18, 1998, where he earned $7.75 per hour for forty hours of work per week. He left this job to begin employment with Michael's Coffee Service.

15. Claimant began working for Michael's Coffee Service in September 1998, where he earned $7.75 to $8.00 per hour. He worked there until March 23, 1999.

The undersigned accepts the stipulations that are stated above.

Issues

1. Is the decision of the Virginia Worker's Compensation Commission (hereinafter "VWCC") that Employer properly discharged Claimant for cause binding on this Court under the doctrines of collateral estoppel and full faith and credit?

2. Is Claimant entitled to temporary disability benefits for the time period after which he was terminated by Employer?

3. Is Claimant entitled to medical treatment from Dr. Romash?

4. Is the decision of the VWCC that Claimant's alleged knee and back injuries are unrelated to his August 24, 1995 ankle injury binding on this Court under the doctrines of collateral estoppel and full faith and credit?

5. If the VWCC decision is not binding, are Claimant's alleged knee and back injuries related to his August 24, 1995 ankle injury?

Procedural History

On October 6, 1995, a deputy from the Virginia Employment Commission (hereinafter "Commission") determined that Claimant was disqualified for unemployment compensation. (Ex. 18-1.) The Virginia Unemployment Compensation Act provides that an employee will be disqualified if his employer discharges him for misconduct in connection with work. Id. On September 14, 1995, Employer required Claimant to take a urinalysis test pursuant to its policy for workers injured on the job. Id. Employer notified Claimant on September 26, 1995 that he had tested positive for cocaine. On September 27, 1995, Employer discharged him for violating Company Rule No. 4, which forbids employee drug use. (Ex. 18-3.) As a result, the deputy from the Commission determined that Claimant had engaged in misconduct that disqualified him for unemployment compensation as of October 1, 1995. (Ex. 18-1.)

Claimant filed an application with the Virginia Workers' Compensation Commission seeking medical and disability benefits for his August 24, 1995 ankle injury. (Ex. 17-1.) A hearing before the VWCC occurred on August 12, 1998. (Ex. 17-1.) In his February 9, 1999 decision, Deputy Commissioner Wilder determined that Employer terminated Claimant for cause. (Ex. 17-7.) Tim Spruill, Claimant's supervisor at the time of the injury, stated that Employer provided light duty work to Claimant following his August 24, 1995 work accident. (Ex. 17-5.) However, Employer terminated Claimant after a drug screen revealed positive results for cocaine use. (Ex. 17-3.) The VWCC determined that Claimant's drug use justified his discharge. (Ex. 17-7.) Therefore, Claimant was barred from receiving temporary partial disability benefits following his termination.[2] (Ex. 17-7, 17-8.) According to Employer, Claimant did not appeal the decision, so it became final on March 1, 1999. See Employer's Brief, p. 2.

On April 22, 1999, Claimant filed another application with the VWCC seeking medical treatment and temporary total disability benefits for alleged back and knee problems that he asserted were compensable consequences of the original ankle injury. (Ex. 16-1, 16-2.) On September 27, 1999, Deputy Commissioner Lahne issued a decision finding that Claimant's alleged knee and back problems were not compensable. (Ex. 15-3, 15-4.) Claimant failed to produce evidence that showed he suffered from a knee problem or that the alleged problem was causally related to his work injury. (Ex. 15-3.) Moreover, Deputy Commissioner Lahne concluded that the uncertain medical evidence regarding Claimant's back condition was insufficient to establish a causal relationship with his August 24, 1995 work injury. (Ex. 15-4.) As a result, the VWCC found that Employer was not liable for Claimant's alleged knee or back condition. Id.

In an April 11, 2000 Review, the full VWCC affirmed the September 27, 1999 opinion. (Ex. 14-1.) The VWCC concurred with the Deputy Commissioner that the medical records did not support

---

[2]The VWCC awarded Claimant temporary total disability benefits from September 19, 1995 through September 22, 1995, and from January 17, 1996 through December 26, 1996. It also awarded him permanent partial disability benefits based on a thirty percent impairment of his right ankle for thirty seven and a half weeks. (Ex. 17-8, 17-9.)

a finding that Claimant experienced knee pain as a result of the physical therapy prescribed following Claimant's ankle surgery. (Ex. 14-6.) It found that the Deputy Commissioner correctly determined that Claimant's knee problems were not causally related to his original accident. Id. Moreover, the VWCC also found that Claimant did not meet his burden of proving the causal connection between his back condition and his accident. (Ex. 14-7.) Due to Claimant's delay in reporting any back symptoms and the contradictory opinion of his attending physician, Dr. McCoy, the VWCC determined that the evidence, at best, established the possibility of a causal connection. Id. (emphasis added) Therefore, the VWCC affirmed the Deputy Commissioner's opinion in its entirety. (Ex. 14-8.) According to Employer, Claimant did not appeal the VWCC decision and it became final on May 11, 2000. See Employer's Brief, p. 3.

Claimant then filed a claim under the LHWCA seeking an award for temporary total disability benefits and medical benefits for the alleged back and knee injuries, as well as future medical benefits for his original ankle injury. A hearing occurred before the undersigned on July 20, 2000.

Findings of Fact

Ankle Injury

Claimant is thirty eight years old and was employed by Norshipco as a ship fitter helper in the early 1990s. (Tr. at 16.) As a ship fitter helper, he "prop[ed] fit, prop[ed] the work area, help[ed] and assist[ed] with welding, burning, anything that dealt with building ships." Id. Claimant stated that he sometimes had to carry anywhere between thirty and one hundred pounds from the tool room onto the gang plank and then down into the engine room on the ship. (Tr. at 17.) In order to reach the ship, he would have to climb ladders up the gang walk. Id.

On August 24, 1995, he was "cleaning the catwalk and fixing the engine room" at the bottom of the NIAGARA FALLS. (Tr. at 16-17.) While he was working, a piece of steel fell and smashed his ankle. (Tr. at 17.) Claimant reported the incident to his supervisor who directed him to Employer's first-aid clinic. (Tr. at 18.) The clinic subsequently referred Claimant to Nowcare. Id. The physician at Nowcare referred Claimant to Dr. Stephen McCoy, an orthopedic surgeon. (Tr. at 18; Ex. 19-4.) Claimant first visited Dr. McCoy in September 1995.[3] Id. At that time, Dr. McCoy determined that Claimant had "aggravated a pre-existing severe osteoarthritic condition." (Cx. 1.)

Dr. McCoy performed fusion surgery on Claimant's ankle on January 17, 1996, which resulted in the temporary need for Claimant to wear an ankle cast. (Ex. 12-21; Cx. 11.) After the ankle cast was removed, Dr. McCoy advised Claimant to increase his walking to help rehabilitate his ankle. (Tr.

[3]Claimant acknowledges that Dr. McCoy is his authorized treating physician. (Tr. at 30.)

at 20.) On May 13, 1997, Dr. McCoy stated that Claimant "continue[d] to have discomfort in that ankle and some swelling. I think this will gradually resolve, but I think it is time to put him at maximum medical improvement." (Ex. 12-43.) He determined that Claimant had a 7% whole person permanent partial impairment, which translated into a 17% impairment of the lower extremity and a 24% impairment of the foot. Id. At that time, Dr. McCoy assigned permanent restrictions that included: no standing or walking for extended periods of time, no climbing ladders, no being at unprotected heights, no lifting weights over 50 pounds. (Ex. 12-44.)

On February 3, 1999, Dr. McCoy noted that Claimant continued to complain of ankle discomfort. (Ex. 12-39; Cx.2.) He reviewed some x-rays and determined that the ankle fusion did not appear to be completely fused. Id. Although Dr. McCoy opined that the ankle probably needed to be refused, he stated that neither he nor Claimant wanted to undertake another operation at that time. Id. On July 14, 1999, Dr. McCoy reexamined Claimant and determined that he had a "symptomatic ankle post fusion." (Ex. 19-6.) To ensure an accurate diagnosis, he referred Claimant to Dr. Graham for a second opinion. (Ex. 12-21.) Ultimately, Dr. Graham sent Claimant back to Dr. McCoy for further treatment because he could not "find any central reason or scenario that describe[d] [Claimant's] entire pain complex." (Ex. 12-20.)

On October 28, 1999, Dr. McCoy stated that:

> Dr. Graham was not able to discover the source of [Claimant's] pain and recommended a referral to Dr. Romash. Ronnie made an appointment but instead of seeing Romash he saw his partner Dr. Holden. I believe this man should see Dr. Romash for a second opinion and/or treatment of his persistent discomfort in the right ankle. (Cx. 2; see Ex. 12-13.)

At that time, Dr. McCoy limited Claimant's activities to avoid prolonged standing or walking. (Ex. 12-12.) On November 4, 1999, Dr. McCoy stated that Claimant was "scheduled to see Dr. Romash in the near further [sic] for another opinion. This [was] on referral from Holden, from Graham, and from me." (Cx. 2.)

On November 15, 1999, Dr. Romash recommended that Claimant undergo another ankle surgery.[4] (Tr. at 20; Ex. 12-10.) Dr. Romash and Claimant plan to move forward with surgery. (Cx. 2.) On December 20, 1999, Dr. Romash released Claimant to restricted duty with limited his standing and walking. (Ex. 12-7.) On May 15, 2000, Dr. Romash reiterated those restrictions. (Ex. 12-3.)

---

[4]Dr. Robert Adelaar conducted an independent medical examination of Claimant on June 14, 2000. He agreed with Dr. Romash that a future "restabilization of [Claimant's] subtalar joint would be appropriate...." (Ex. 12-1.) On July 19, 2000, Dr. McCoy noted that he agreed with Drs. Romash and Adelaar that "surgical stabilization of the subtalar joint is necessary." (Cx. 25.)

Knee and Back Injuries

Claimant first noticed problems with his knee and back in early 1997 after his ankle cast was removed and he began walking therapy. (Ex. 12-9.) Claimant testified that he regularly complained to Dr. McCoy about the minor problems he experienced. (Tr. at 31.) According to Claimant, Dr. McCoy joked with him that "it was a sign of getting old." Id. In a January 7, 1997 letter, Dr. McCoy noted that Claimant was "having some discomfort in the gastroc heads at the knee, which [Dr. McCoy thought was] probably in the gastroc muscle, responding to the new dynamics of his lower leg." (Cx. 2.) Dr. McCoy's records do not reflect Claimant's complaints of back pain until March 1999. (Tr. at 31.) Neither Dr. McCoy nor any other doctor treated Claimant for knee or back problems. (Tr. at 20-21.)

Claimant finally sought treatment for his back on March 24, 1999 after he experienced severe pain while he was delivering coffee for Michael's Coffee Service. (Tr. at 32; Ex. 12-33; Cx. 12.) He visited the emergency room, where he received pain medication and instructions to follow-up with Dr. McCoy.[5] (Ex. 12-33, 12-34.) On March 26, 1999, Dr. McCoy noted that, prior to the incident, Claimant "had had no previous major problems with his back." (Ex. 12-32.) Dr. McCoy ordered x-rays, which revealed "a L4-5 degenerated disk with spurring, but not much narrowing...." (Ex. 12-32.)

To treat Claimant's back problems, Dr. McCoy prescribed physical therapy. (Tr. at 21-22.) However, the insurance company ultimately denied coverage for that treatment. (Tr. at 21-22.) When Claimant failed to get authorization for physical therapy, Dr. McCoy contacted Employer on April 9, 1999 and stated that:

> [Dr. McCoy] felt that [Claimant's] back pain was an exacerbation [of] previously existing problems because of his gait abnormality. His MRI show[ed] multiple changes....His abnormal gait caused this to become symptomatic. My note from 3-26-99 said [Claimant] had had 'no previous major problems with his back.' The implications, there being, that he has had minor problems....He tells me that he has mentioned these minor problems repetitively in the office. I regretfully have not made any note of that....
> (Ex. 12-30; Cx. 2.)

Dr. McCoy ended the note by reiterating his opinion that Claimant's gait abnormality "exacerbat[ed] a previously excising [sic] problem." Id. On April 14, 1999, Dr. McCoy issued the following restrictions:

---

[5]At that time, Claimant wondered "whether or not the back pain [came] from the fact that he [favored] his left leg." (Ex. 12-33.)

no lifting more than ten to fifteen pounds; no climbing, bending or squatting; and no prolonged standing or walking. (Ex. 12-28.) With those same restrictions, Dr. McCoy opined that Claimant could have worked through the date of the hearing in a light duty capacity. (Ex. 19-24.)

On June 9, 1999, Dr. McCoy stated that:

> Mr. Davenport claims to have mentioned his back pain to me on his multiple visits. However, that complaint really is not documented. Certainly, his back pain has not been incapacitating in any way during the time I have been seeing him until the incident delivering coffee. It is conceivable that some minor back problems could be caused by his mildly abnormal gait. However, a severely incapacitating back problem I don't believe could be caused by the gait abnormality that he exhibits. It is my opinion, within a reasonable degree of medical certainty, that the severity of his back pain and his limp are not directly connected in a causal manner to his ankle injury. (Ex. 12-26; Cx. 2.)

Dr. McCoy gave Claimant a disability slip on June 16, 1999 stating that Claimant had been "out of work since his back started hurting him." (Tr. at 33.)

On July 8, 1999, Dr. McCoy attempted to clarify his position regarding Claimant's back problem. (Cx. 2.) He stated:

> I refer you to the note of April 9, 1999, that the patient's abnormal gait had caused his back to be symptomatic....As I stated in my letter of June 9, 1999, I do not think that the gait abnormality that he exhibits should have caused the underlying, <u>severely</u> incapacitating back problem....In my opinion, within a reasonable degree of medical certainty,....the exacerbation of previously existing problems is directly related to the ankle injury in a causal manner.[6] (Cx. 2.)

At the hearing, Claimant stated that he did not have any injuries to either his knees or his back between 1995 and the time of the hearing. (Tr. at 22.)

<u>Work History</u>

---

[6]At his deposition, Dr. McCoy stated that he "never had any diagnosis that [he] could come up with for [Claimant's] back pain." (Ex. 19-8.)

Claimant returned to light duty work at Norshipco on August 28, 1995. (Ex. 21-16; Cx. 1.) Dr. McCoy issued the following restrictions: no ladder climbing, no prolonged standing or walking, and no lifting over twenty pounds. (Cx. 8.) Employer assigned him to a position in the connex box where he counted screws. (Ex. 22-9.) Claimant worked in this position for approximately one month. Id. On September 14, 1995, Claimant submitted to a urinalysis test, which is part of the standard process for employees involved in work accidents. (Ex. 4-1.) On September 26, 1995, Employer discharged Claimant for testing positive for cocaine.[7] (Tr. at 28.) Mr. Baker, the manager of human resources and security at Norshipco, testified that Employer terminated Claimant for violating Company Rule No. 4, which forbids with employee drug use. (Tr. at 39-40; Ex. 8-3, 8-4, 9.) Claimant spoke with a union representative about his discharge; however, no hearings were held.[8] (Tr. at 29; Ex. 21-16, 22-15.) Despite Claimant's "grievance," Employer did not rescind Claimant's discharge. (Ex. 21-17.)

Claimant has not worked at Norshipco since September 1995. (Tr. at 22.) From October 1997 until February 1998, Claimant worked as a building superintendent for the United States government. (Tr. at 22-23.) The government did not retain him in that position because of poor performance and falsification of a key log. (Tr. at 36; Ex. 20-8.)

Next, he delivered papers for two nights as a carrier for the Virginian Pilot. (Tr. at 23.) He stopped working there because of the hours and because he obtained other employment. Id. In early 1998, Claimant worked for Dagenhart Sprinklers for two days.[9] See Stipulations. From May 1998 through August 1998, he worked at Kramer Tires in the retread department. (Tr. at 24; Ex. 21-20.) He left that position because it required him to be on his feet too long and he found other employment. (Tr. at 24.)

From October 1998 through March 1999, he worked for Michael's Coffee Service as a route manager. (Tr. at 24; Ex. 21-21.) In that job, he had "to call customers and check their orders and make sure they were supplied and also deliver orders to the customers." Id. After making a delivery on March 23, 1999, Claimant collapsed from back pain. (Tr. at 25; Ex.21-24.) According to Claimant, he "was walking back to [his] van, just walking, and [he] felt pain come up [his] leg and to [his] back and [he] collapsed, bent over. It buckled [him] over." (Tr. at 25.) When his doctor finally released him for light duty work after his collapse, Michael's Coffee Service had no light duty work available. Id. Claimant looked at the job postings at City Hall and applied for three or four positions. (Tr. at 37-38;

---

[7]According to the medical records, Claimant acknowledged that he last used cocaine three weeks prior to the urinalysis. (Ex. 4-2.)

[8]The union has the responsibility to request a discharge hearing within seven days of the date that the employee becomes aware of the incident. (Tr. at 44-45.)

[9]Claimant testified that he worked at Dagenhart Sprinklers for approximately two weeks. (Tr. at 23-24.)

Ex. 21-15.) He has not worked for any employer since he left Michael's Coffee Service. (Tr. at 25.)

Barbara Byers, a vocational and rehabilitation counselor, performed a labor market survey for Claimant. (Tr. at 45-46.) She reviewed the medical records from Dr. Romash, Dr. McCoy, Dr. Adelaar, Dr. Holden and Dr. Graham.[10] (Tr. at 47.) She also examined OWCP rehabilitation reports, Claimant's employment records from Employer and from subsequent employment, and she reviewed information from Claimant's deposition. Id.

Claimant received his GED in 1980. (Tr. at 47; Ex. 13-2.) In 1982, he obtained a certificate in basic auto repair from Tidewater Skills Center. (Ex. 13-2.) Later, he attended electronics technician classes for approximately one year at Norfolk State University. (Tr. at 47.) OWCP sponsored his certification in computer software, including word processing, databases, spreadsheets, and Windows Operating Systems. Id. He also completed a Tidewater Maritime Training Institute program in shipyard procedures in 1995. (Tr. at 48; Ex. 13-2.)

The initial labor market survey addressed the period from March 1999 through the date of the hearing. Id. Ms. Byers found actual jobs within Claimant's physical restrictions that were available during that period, which included positions as a cashier, salesperson, driver, and dispatcher. (Tr. at 49.) She also found available jobs within categories like telephone interviewing and customer service. Id. Ms. Byers determined that Claimant qualified for the positions based on his education and work history. Id. The current wages for the positions average between $8 and $10 per hour. Id. (emphasis added) However, in March 1999, some of the same positions paid only $7.50. Id. At the hearing, Ms. Byers could not determine what the salary ranges for the positions would have been in August 1995; however, she stated that most of the positions would have paid less than $8 to $10 per hour. (Tr. at 58-59.) In her revised labor market survey, Ms. Byers determined that the 1995 wages ranged between $4.25 per hour and $9.00 per hour.[11] (ALJ 1.)

Discussion

1. Is the decision of the VWCC that Employer properly discharged Claimant for cause binding on this Court under the doctrines of collateral estoppel and full faith and credit?

---

[10]After Claimant reached maximum medical improvement, he had permanent restrictions that included: no standing or walking for extended periods of time, no climbing ladders, no unprotected heights, and no lifting weights over 50 pounds. (Cx. 2.)

[11]Ms. Byers also identified available jobs for the periods between September 9, 1995 and January 16, 1996; January 8, 1997 and October 2, 1997; and February 18, 1998 and May 17, 1998. Id.

Collateral estoppel precludes "the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate."[12] Sedlack v. Braswell Services Group, 134 F.3d 219, 224 (4th Cir. 1998). The Fourth Circuit requires five elements prior to the application of collateral estoppel:

> (1) the issue sought to be precluded is identical to one previously litigated;
> (2) the issue must have been actually determined in the prior proceeding;
> (3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding;
> (4) the prior judgment must be final and valid;
> (5) the party against whom estoppel is asserted must have had a full and fair opportunity to litigate the issue in the previous form.

Sedlack, 134 F.3d at 224.

If all five elements exist, then collateral estoppel will apply unless Claimant can show that he "had a heavier burden of persuasion on [the] issue in the first action than he does in the second." Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 583 F.2d 1273, 1279 (4th Cir. 1978), cert. denied 440 U.S. 915 (1979); Bath Iron Works v. Director, OWCP, 125 F.3d 18, 21 (1st Cir. 1997).

In a hearing before the VWCC on August 12, 1998, Claimant sought an award of medical and disability benefits for his August 24, 1995 ankle injury. (Ex. 17-1.) Employer defended the application, in part, on the grounds that Claimant "unjustifiably refused light duty work by a termination for cause...." (Ex. 17-2.) Employer presents the identical defense in this case. It asserts that it discharged Claimant for a violation of Company Rule No. 4, which pertains to employee drug use. (Ex. 8-3, 8-4.) After hearing the parties' arguments and evidence, Deputy Commissioner Wilder determined that Employer properly discharged Claimant for drug use and that Claimant's discharge qualified as a termination for cause. (Ex. 17-8.) Claimant had a full and fair opportunity to litigate the issue before the VWCC.[13] As a critical and necessary part of the decision, the Deputy Commissioner's determination precluded Claimant from receiving temporary partial disability benefits. See Ex. 17. Claimant did not appeal the decision, so it became final on March 1, 1999. Thus, Employer has established the five elements necessary for the application of collateral estoppel.

---

[12]The Benefits Review Board has declared that "factual findings of a state administrative tribunal are entitled to collateral estoppel effect in other state or federal administrative tribunals." Barlow v. Western Asbestos Co., 20 BRBS (MB) 179, 180 (1988).

[13]Claimant had the opportunity to explain the results of the drug test during two depositions and during the hearing before the Deputy Commissioner. (Ex. 17, 21-16, 21-17, 22-24, 22-25.)

In order to prevent the application of collateral estoppel, Claimant must "show that he had a heavier burden of proof in the [VWCC] case." Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 583 F.2d 1273, 1279 (4th Cir. 1978), cert. denied 440 U.S. 915 (1979); Bath Iron Works v. Director, OWCP, 125 F.3d 18, 21 (1st Cir. 1997). The Virginia Act requires Claimant to prove by a preponderance of the evidence that he is entitled to disability benefits, which is the same burden that he bears under the Longshore Act.[14] The Deputy Commissioner found that Claimant "did not satisfactorily explain the positive test result from the September 14, 1995 drug screen." (Ex. 17-8.) Based on the preponderance of the evidence, the VWCC determined that Claimant's discharge constituted a termination for cause. Id. As Claimant bears the same burden of proof in both cases, he is precluded from relitigating the issue of whether Employer terminated Claimant for cause under the Longshore Act.

2. Is Claimant entitled to temporary disability benefits for the time period after which he was terminated by Employer?

Once Claimant has established that he is unable to return to his former employment because of a work-related injury, the burden shifts to the employer to demonstrate the availability of suitable alternative employment. Preziosi v. Controlled Industries, 22 BRBS 468, 471 (1989); Elliott v. C & P Telephone Co., 16 BRBS 89, 91 (1984). Employer can meet its burden by showing a suitable job that Claimant actually performed after his injury. Brooks v. Director, Office of Workers' Compensation, 27 BRBS 100, 101 (CRT) (1993).

In this case, Employer voluntarily paid temporary total and permanent partial disability benefits for Claimant's August 24, 1995 ankle injury. (Ex. 1-1.) On August 28, 1995, Claimant returned to light duty work at Norshipco. (Ex. 21-16; Cx. 1.) Claimant was unable to return to his former position because he could no longer perform the physical requirements of his job, which included climbing ladders and lifting heavy weights. (Tr. at 17.) On September 26, 1995, Employer discharged Claimant for violating its policy against drug use. (Tr. at 28.) As previously discussed, Claimant is precluded from relitigating whether Employer terminated him for cause.

The Court finds that Employer met its burden of establishing suitable alternate employment when it provided a light duty job to Claimant. In Brooks v. Newport News Shipbuilding, the Benefits Review Board determined that:

> [Brooks'] discharge occurred because he breached a company rule and not because of his work-related disability. Because claimant's inability to perform the post-injury job at employer's facility on or after October 14, 1986 was due to his

[14]The 20(a) presumption under the Longshore Act is inapplicable in this case because the parties did not dispute whether Claimant sustained a work-related ankle injury.

> own misfeasance in violating a company rule, any loss in his wage-earning capacity thereafter is not compensable under the Act inasmuch as it is not due to claimant's disability resulting for his work-related incident.

Brooks v. Office of Workers' Compensation Programs, 27 BRBS 100 (CRT) (*citing* Brooks v. Newport News Shipbuilding and Dry Dock Co., Nos. 89-2340 & 89-2340A (BRB June 9, 1992), *reprinted in* J.A. at 28.). The Fourth Circuit affirmed the reasoning of the Benefits Review Board. Id. Applying the same analysis, this Court finds that any loss in Claimant's wage-earning capacity after September 26, 1995, the date of his termination, is not compensable under the Act because that loss was not due to Claimant's disability. Moreover, the vocational consultant has identified jobs that Claimant has been capable of performing since 1995.

3. Is Claimant entitled to additional medical treatment from Dr. Romash?

According to Section 7(c)(2) of the Act:

> [a]n employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

33 U.S.C. § 907(c)(2). In Armfield v. Shell Offshore, 25 BRBS 303, 309 (1992), the Board affirmed the judge's conclusion that the claimant was not required to seek prior authorization for her psychiatric treatment where the evidence indicated that the claimant had been referred to the psychiatrist by her treating physician. The initial physician was providing the care of a specialist whose services were necessary for the proper care and treatment of the compensable injury pursuant to § 7(b) and (c)(2) of the LHWCA. Id.

In this case, Dr. McCoy, Claimant's treating physician, referred Claimant to Dr. Romash, an orthopedic surgeon with a subspecialty in the foot and ankle. (Cx. 2.) In an October 28, 1999 office note, Dr. McCoy stated that he "believe[d] [that Claimant] should see Dr. Romash for a second opinion and/or treatment of his persistent discomfort in the right ankle." (Cx. 2.) Dr. Romash examined Claimant on November 15, 1999 and recommended additional surgery.

(Ex. 12-11.) Contrary to his office note, Dr. McCoy later stated that he had not referred Claimant to Dr. Romash at any time prior to November 15, 1999. (Attachment A, Ex. 7.) Dr. McCoy's office note provides the most accurate record of Dr. McCoy's intent and actions during the period immediately preceding Claimant's office visit with Dr. Romash. Based on Dr. McCoy's office note, the Court finds that Dr. McCoy referred Claimant to Dr. Romash for treatment.

Dr. Romash specializes in orthopedic problems in the foot and ankle. (Cx. 2.) He can provide Claimant with services that Dr. McCoy cannot provide, which are necessary for and appropriate to Claimant's proper care and treatment that Dr. McCoy cannot provide. 33 U.S.C. § 907(c)(2). Therefore, Claimant was not required to seek prior authorization for a change of physician. Armfield, *supra*. The language in Section 7(c)(2) of the Act mandates that Employer give its consent to Claimant's treatment by Dr. Romash. 33 U.S.C. § 907(c)(2).

4. Is the decision of the VWCC that Claimant's alleged knee and back injuries are unrelated to his August 24, 1995 ankle injury binding on this Court under the doctrines of collateral estoppel and full faith and credit?

Knee Injury

Employer argues that the doctrine of collateral estoppel applies to prevent the relitigation of whether Claimant's alleged knee injury is causally related to his August 24, 1995 ankle injury. The VWCC addressed this issue in its September 27, 1999 decision in which it determined that Claimant's alleged knee injury was not causally related to his ankle injury. (Ex. 15-3, 15-4.) As the primary question before the VWCC, the issue of causation was a critical and necessary part of its decision. See Ex. 15. Moreover, Claimant had a full and fair opportunity to litigate this issue before the VWCC. On April 11, 2000, the full VWCC affirmed the September 27, 1999 decision. (Ex. 14-1.) Claimant did not appeal the decision, so it became final and valid on May 11, 2000. So, the circumstances satisfy the Fourth Circuit's five-part test for the application of collateral estoppel.

To prevent collateral estoppel, Claimant must show that he had a heavier burden of persuasion the VWCC case. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 583 F.2d 1273, 1279 (4th Cir. 1978), cert. denied 440 U.S. 915 (1979); Bath Iron Works v. Director, OWCP, 125 F.3d 18, 21 (1st Cir. 1997). The standard of proof to establish causation differs between the state and federal acts. Typically, Virginia awards compensation only if Claimant proves causation by a preponderance of the evidence. Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP, 583 F.2d 1273, 1278 (1978). In contrast, "an administrative law judge considering a claim under the Longshoremen's Act may enter a finding of work-relatedness based upon a less stringent evaluation of

the evidence offered by the claimant." Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 583 F.2d 1273, 1278-1279 (4th Cir. 1978), cert. denied 440 U.S. 915 (1979).

Indeed, under the Longshore Act, Claimant has the benefit of the 20(a) presumption, in the absence of substantial evidence to the contrary, that his claim comes within the provisions of the Act. 33 U.S.C. § 920(a). In order to trigger the 20(a) presumption, however, Claimant must make a prima facie showing that: (1) he suffered a harm, and that (2) employment conditions existed or a work accident occurred that could have caused, aggravated, or accelerated the condition. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140, 144 (1991); Gencarelle v. General Dynamics Corp., 22 BRBS 170, 174 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989).

In this case, the difference in the burdens of proof precludes the application of collateral estoppel. The VWCC noted a single reference to knee pain in Claimant's medical records, which it determined was insufficient to establish by a preponderance of the evidence that Claimant suffered a knee injury. (Ex. 15-3.) As a result of the 20(a) presumption, this Court uses a lesser standard to establish causation. Claimant's credible subjective complaints of pain are sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS (5th Cir. 1982). Therefore, collateral estoppel does not prevent Claimant from relitigating the issue of whether his alleged knee injury is causally related to his August 24, 1995 ankle injury.

Back Injury

Employer also argues that the doctrine of collateral estoppel applies to prevent the relitigation of whether Claimant's alleged back injury is causally related to his August 24, 1995 ankle injury. Although the circumstances meet the Fourth Circuit's five-part test for the application of collateral estoppel, the Court cannot apply the doctrine because the Claimant has a heavier burden of proof under the Virginia Act.

In the September 27, 1999 decision, Deputy Commissioner Lahne concluded that the "uncertain state of the medical evidence regarding the etiology of Claimant's back pain" was insufficient to establish a causal relationship with his August 24, 1995 work injury. (Ex. 15-4.) Although Claimant provided enough evidence to establish that he had suffered a back injury, he failed to prove by a preponderance of the evidence that his back injury was causally related to his work accident. Id.

Under the Longshore Act, Claimant has the benefit of the 20(a) presumption, which makes his burden of proving causation easier. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140, 144 (1991); Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). As Claimant had a heavier burden of proof in his first case, collateral

estoppel does not apply. Therefore, Claimant can relitigate the issue of causation of his alleged back injury.

5. If not binding, are Claimant's alleged knee and back injuries related to his August 24, 1995 ankle injury?

Knee Injury

Section 20(a) of the Act provides Claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that a work accident occurred which could have caused, aggravated, or accelerated the condition. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140, 144 (1991); Gencarelle v. General Dynamics Corp., 22 BRBS 170, 174 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once Claimant has invoked the presumption, the burden of proof shifts to Employer to rebut it with substantial countervailing evidence. Merrill, 25 BRBS at 144. If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1981); Holmes v. Universal Maritime Serv. Corp., 29 BRBS 18 (1995). At that point, the administrative law judge must weigh all the evidence relevant to the issue and render a decision supported by substantial evidence. Spague v. Director, OWCP, 688 F.2d 862, 866 (1st Cir. 1982); Holmes, *supra*; MacDonald v. Trailer Marine Transport Corp., 18 BRBS 259 (1986).

In this case, Claimant testified that he first noticed problems with his knees in early 1997. (Ex. 12-9.) At that time, Dr. McCoy noted that Claimant was "having some discomfort in the gastroc heads at the knee, which [Dr. McCoy thought was] probably in the gastroc muscle, responding to the new dynamics of his lower leg." (Cx. 2.) The Court finds that Claimant made a prima facie showing that he suffered a harm.

Claimant established that he suffered a work-related ankle injury on August 24, 1995. (Tr. at 16-17.) Dr. McCoy performed fusion surgery on January 17, 1996 in an effort to remedy Claimant's ankle problems. (Ex. 12-21; Cx. 11.) After the surgery and cast removal, Claimant experienced pain in his knees. (Ex. 12-9.) Dr. McCoy attributed Claimant's knee pain to "the new dynamics of his lower leg." (Cx. 2.) Based on the above information, Claimant established that a work accident occurred which could have caused the problems in his knees. By establishing the two elements, Claimant made his prima facie claim for compensation and is entitled to the 20(a) presumption.

Thus, the burden of proof shifts to Employer to rebut the presumption of causation with substantial countervailing evidence. Merrill, 25 BRBS at 144. In his July 2, 1996 report, almost a year after the accident, Dr. McCoy noted that Claimant was "having no problems with his knees...." (Cx. 2; Ex. 14-2.) Indeed, Dr. McCoy documented only one instance in January 1997 where Claimant stated that he experienced knee pain. (Cx. 2.) Although Claimant testified that he complained repeatedly to Dr. McCoy about his knee problems, his complaints were not documented in the medical records. (Ex.

16-9.) Neither Dr. McCoy nor any other doctor treated Claimant for his alleged knee pains. (Tr. at 21.) According to Claimant, Dr. McCoy attributed Claimant's minor pains to getting old. (Tr. at 31; Ex. 21-25.) Based on the above information, Employer has submitted substantial countervailing evidence that severs the connection between Claimant's harm and his employment.

Therefore, the Court must weigh all the evidence relevant to the issue of causation and render a decision supported by substantial evidence. Sprague v. Director, OWCP, 688 F.2d 862, 866 (1st Cir. 1982); Holmes, *supra*; MacDonald v. Trailer Marine Transport Corp., 18 BRBS 259, 261 (1986). Under the substantial evidence rule, the administrative law judge's findings must be based on such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. See DelVecchio v. Bowers, 296 U.S. 280 (1935). The Court finds Claimant's testimony regarding his repeated complaints of pain is unreliable considering the fact that Dr. McCoy recorded only one instance of knee pain in Claimant's medical records. (Cx. 2.) Moreover, Dr. McCoy considered Claimant's minor pains as a "sign of getting old."(Tr. at 31.) Without more information, it is unclear that Claimant experienced any persistent pain in his knee related to his change in gait. Therefore, the Court finds that Claimant failed to prove by a preponderance of the evidence that a work-related injury led to a subsequent knee impairment.

Back Injury

To trigger the 20(a) presumption, Claimant must establish that: (1) he sustained physical harm or pain; and (2) an accident occurred in the course of his employment that could have caused his pain. Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984). In this case, Claimant testified that he noticed problems with his back after his ankle surgery and complained to Dr. McCoy about his pain. (Ex. 12-9; Tr. at 21, 31.) On March 24, 1999, Claimant sought treatment for his back after he experienced pain while he was working for Michael's Coffee Service. (Tr. at 32; Ex. 12-33; Cx. 12.) The Court finds that Claimant established a prima facie showing that he suffered a harm.

However, Claimant has not shown that an accident occurred in the course of his employment that could have caused or aggravated his back pain. Claimant testified that he experienced back pain when he began walking therapy after his ankle surgery. (Ex. 12-9.) However, Claimant's medical records do not reveal any back complaints prior to the incident in March 1999, which occurred almost three years after his initial injury. (Tr. at 21, 31.) At first, Dr. McCoy stated that he "felt that [Claimant's] back pain was an exacerbation [of] previously existing problems because of his gait abnormality. His MRI show[ed] multiple changes....His abnormal gait caused this to become symptomatic." (Ex. 12-30; Cx. 2.) Later, he opined "that the severity of [Claimant's] back pain and his limp [were] not directly connected in a causal manner to his ankle injury." (Ex. 12-21; Cx. 2.) Finally, he stated that "the exacerbation of previously existing problems [was] directly related to the ankle injury in a causal manner." (Cx. 2.) Dr. McCoy contradicts himself on whether Claimant's back pain causally relates to his ankle injury. The Court finds that Dr. McCoy's testimony is not credible because of its inconsistency. Without additional evidence that Claimant's work accident could have caused the back

pain he experienced three years later, Claimant fails to meet his prima facie burden of showing a work accident at Norshipco that could have caused or aggravated his back pain. Therefore, Claimant is not entitled to the 20(a) presumption.

Order

It is hereby ORDERED that:

1. Claimant's request for compensation benefits after May 7, 1997 (except for the schedule rating) for his August 24, 1995 ankle injury is DENIED.

2. Employer is hereby ordered to pay all medical expenses related to Claimant's work-related ankle injury, which includes treatment that Dr. Romash provided.

3. Claims for compensation and medical treatment for back and knee impairments are DENIED.

4. Claimant's attorney, within twenty (20) days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have (10) days to respond with objections thereto.

_____

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/kap
Newport News, Virginia